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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Seventh session

SUMMARY RECORD OF THE 11th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 1 December 1992, at 3 p.m.

Chairman: Mr. ALSTON

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The meeting was called to order at 3.15 p.m.

ORGANIZATION OF WORK (agenda item 2) (continued)

Towards an optional protocol to the International Covenant on Economic, Social and Cultural Rights (E/C.12/1992/WP.9)

1. THE CHAIRMAN introduced the discussion note he had prepared on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (E/C.12/1992/WP.9). At the outset, he would point out that the idea of an international procedure for the submission of complaints relating to the implementation of economic, social and cultural rights was not really new since such procedures had been in place for many years in the ILO and UNESCO, with regard to rights coming within their respective areas of competence; the procedure established under Economic and Social Council resolution 1503 (XLVIII) (the "1503 procedure") was also applicable to economic, cultural and social rights. Moreover, there was no basis for misgivings that with the adoption of an optional protocol establishing such a procedure, the Committee would be inundated with complaints, justified or otherwise, to the point where it could no longer cope with its work. The procedure provided in the Convention on the Elimination of All Forms of Racial Discrimination had in 10 years generated no more than a handful of complaints, as was also the case for the procedure provided in the Convention against Torture.

2. He recalled that at its sixth session the Committee had welcomed the proposal to draw up an optional protocol to the Covenant. Its members had then identified four main issues which they wished to consider at the present session, namely: who should have access to the procedure to be initiated by a protocol, the rights to be covered by that procedure, the procedural rules that would apply and the outcome envisaged. In the discussion note he had submitted to the Committee in 1992, he had considered those points in turn and outlined the various solutions available. He taken a cautious approach, considering that there was no point in proposing action that States were unlikely to accept. He had also proceeded from the assumption that complaints from individuals would not be accepted under the procedure unless they were related to situations with an impact that went beyond the narrow concerns of the individual applicant. In other words, only those cases likely to become "test" cases would be considered. Such a system gave weight to political considerations and might appear too conciliatory. In actual practice, it would not be particularly restrictive, since there were few notable problems associated with the effective exercise of economic, social and cultural rights that did not have repercussions beyond the sphere of the individual. In that context the real problem would be to choose from among the options proposed in paragraphs 21 and 22 of the discussion note those that best reflected the concept that the prejudice in question was not restricted to a single individual.

3. Mr. TEXIER considered that the principle of the indivisibility of human rights, which meant that economic, social and cultural rights should be accorded equal status with civil and political rights, underscored the need for an optional protocol to establish a complaints procedure for economic,

social and cultural rights similar to that already in existence for civil and political rights. He was persuaded that the Committee should unequivocally endorse the need for such an instrument and play a major role in drafting it.

4. With regard to the fundamental principles underlying such a procedure, and in particular who, whether State, individual or group, could exercise the right of complaint he admitted that the inter-State complaints procedure provided in article 41 of the International Covenant on Civil and Political Rights had never been invoked since the Covenant's entry into force in 1976, whereas many individual complaints had been made under the Optional Protocol to that Covenant. However, he did not consider that a collective complaints procedure should be chosen rather than an individual procedure. The very nature of economic, social and cultural rights meant that attacks on individual rights were representative of wider problems. Moreover, the Committee was hardly likely to be inundated with complaints if an individual procedure was instituted: apart from the procedures established within the United Nations system, there were courts in two regions of the world - the European Court of Human Rights and the Inter-American Court of Human Rights - that were competent to receive complaints on the subject. While it was true that both were inundated with complaints, it should be remembered that they were actual courts, which was not the case of the Committee. His objection to the idea of restricting collective complaints to non-governmental organizations having consultative status with the Economic and Social Council was that such organizations were not represented throughout the world; that would force individuals to act through intermediaries they were not necessarily familiar with, which would hamper their access to the Committee. He was doubtful whether such a restriction, which was not included in the 1503 procedure, was necessary or whether it would be a simple matter in future to expand a procedure that was limited at the outset, since it would involve negotiating amendments to the protocol. In short, the Committee should be given every latitude to rule on the representativity of a group and the objectivity of the data on which a complaint was founded.

5. On the subject to the rights to which the procedure would apply and the various options put forward - certain rights only, those covered by articles 6 to 15, or the Covenant as a whole - he was in favour of the third solution; once again it would be simpler for the Committee to proceed from the broadest possible base and then gradually narrow its field of operations as it developed its jurisprudence. In that area too, it was important not to restrict the Committee's scope at the outset.

6. As to the procedural rules to be applied, the Chairman's reasoning in his discussion note was sound, in particular with reference to the exhaustion of domestic remedies and the temporal dimension under which complaints were not admissible unless related to acts or omissions subsequent to the entry into force of the protocol in the State party concerned. As for the restriction on subject matter, that to be admissible complaints must specifically relate to the rights recognized in the Covenant, he again considered that the Committee should not have its hands tied.

7. With regard to the outcome of the procedure, he recalled that the Committee was not a court and would thus have to abide by the rule followed by the Committee on Human Rights within its sphere of competence, namely, that

once it had considered a communication, it should "forward its views to the State party concerned and to the individual". It did not seem unproductive to him to stop there. The recommendations made to States by the European Court of Human Rights, following consideration of a complaint or a group of complaints had had a useful result in France, which had thus been led to review the period of pre-trial detention. Lastly, the consideration of individual cases could help the Committee to find out how the Covenant worked in actual practice, which it might not do if it looked no further than reports from States parties, which were always very general in nature. In short, both the Committee, the States parties and the Covenant itself had much to gain from adoption of an optional protocol.

8. Mr. NENEMAN said that some of the solutions put forward for the different points under consideration represented a minimalist and others a maximalist approach. His preference would be for the maximalist approach, since the time was ripe for it. In specific terms, he considered that the complaints procedure should apply to the entire Covenant, and individuals, in the same way as groups and States, should be able to submit complaints. In the case of groups, that right should be accorded to all non-governmental organizations operating at the national level which had the closest knowledge of the domestic situation; it should not be confined to non-governmental organizations enjoying consultative status with the Economic and Social Council. A glance at the list was enough to show that such organizations were by no means evenly represented throughout the world and far from covering the entire range of possible interests. With regard to individual complaints, it would be advisable to admit only those denouncing a systematic act or omission; otherwise the Committee might become involved in matters beyond its terms of reference. Turning to the procedural rules, he considered some of the restrictions proposed to be reasonable, in particular the rule of non-duplication of procedures, set out in paragraph 47 of the discussion note, and stipulation concerning the exhaustion of all available domestic remedies, if only for the simple reason that the problem might well be resolved at the domestic level without the need for recourse to an international body.

9. Mr. SIMMA said that, at best, States had reservations about the idea of adopting an optional protocol to the International Covenant on Economic, Social and Cultural Rights. It was therefore vital that the Committee should take great care in drawing up any recommendation to that effect and examine all the difficulties inherent in such a project in order to anticipate any objections it would meet from States.

10. The temporal dimension referred to in paragraph 41 of the Chairman's discussion note, which stipulated that complaints were only admissible in so far as they related to acts or omissions which occurred after the protocol had come into effect for the State party concerned, appeared self-evident in the case of civil and political rights, but was not necessarily so for economic, social and cultural rights. For example, how would the rule that complaints could not have retrospective effect be applied in cases where a complaint pointed to serious and long-standing defects in the educational system or health services of a country? It would be years before such complaints could be declared admissible, and during that time the situation would simply become worse.

11. As for exercise of the right of complaint, the fact that there had been no recourse to the inter-State procedures provided for by the United Nations system or at the regional level did not mean that the possibility of such procedures should be ruled out. It could well be that States' attitudes to human rights would change so that one day they might wish to invoke an inter-State procedure, which might then prove more useful than at present.

12. Like the Chairman, he considered that the Committee should accept petitions from both individuals and groups (para. 20). However, when the petitioner was an individual, the requirement that he must show that the issue raised affected a "significant" number of people, was "patterned" or "systematic" (para. 21) or was evidence of "persistent discrimination" (para. 22) raised serious difficulties. In fact, a typical victim of an economic, social or cultural rights violation (the right to housing or the right to food) would have great difficulty in proving that his case was only one of the components in an overall pattern. His situation differed from that of the typical victim of a civil or political rights violation, who was frequently a political activist, educated enough to be able to prove his point. He therefore felt that individual communications should simply be accepted without having to meet a criterion.

13. That criterion would also set a difficult problem with regard to the admissibility of complaints. In the procedure established by Economic and Social Council resolution 1503 (XLVIII), generally referred to as the "1503 procedure", the decision concerning admissibility was administrative rather than legal in character. If the Committee wished to take a genuinely legal approach, the criterion to the effect that the act or omission cited must be "systematic" would be inapplicable as a test of admissibility intended to "exclude cases which clearly involved only isolated incidents affecting only one individual and practised by only one respondent" (para. 21). Only through a consideration of the background to the affair could the Committee come to such a conclusion.

14. Mrs. IDER said that the time had come for the Committee to recommend the preparation of an optional protocol. Indeed, the principle of the indivisibility of human rights required a protocol for economic, social and cultural rights in the same way as for civil and political rights. The existence of such a protocol would enhance the importance of the rights contained in the Covenant. It must be recognized, however, that the realization of economic, social and cultural rights depended largely on countries' economic and financial potential and that, given the difficult situation in which they found themselves, it was not likely that very many developing countries would ratify such a protocol. However, since the drafting and ratification of such an instrument would necessarily take time, it was advisable for the Committee to tackle the matter without delay.

15. Complaints made by States should be accepted. In the case of economic, social and cultural rights, they were likely to be more numerous than in the case of civil and political rights, because of the scale of migration between countries or even from one continent to another, which would probably lead many States to avail themselves of the procedure. In addition, the Committee should accept complaints from individuals and groups. Like Mr. Neneman, she considered that the non-governmental organizations in consultative status with

the Economic and Social Council should not be the only collective organizations entitled to submit complaints. Non-governmental organizations in Asia, which did not enjoy that status, were very active and ought to be allowed such a role. As far as complaints from individuals were concerned, the violations in question should not have to be "systematic" or "persistent", which would be very difficult to prove. It might be sufficient to require that the same matter was not already being examined under another international procedure and that all available domestic remedies had been exhausted - the conditions of admissibility provided in the Optional Protocol to the International Covenant on Civil and Political Rights (art. 5) - and that the complaint should be made within a given time-limit.

16. Mr. RATTRAY said that he also considered it was time for the Committee to consider the need for an optional protocol. The Chairman's discussion note set out the points to be considered in that regard and gave the Chairman's views on the subject. His own position was neither maximalist or minimalist but realistic: he hoped to arrive at a protocol that had a good chance of being ratified by as many States as possible.

17. On the question of who could exercise the right of complaint, he was not in favour of the procedure under which one or more States parties might lodge a complaint against another State party (para. 14). That was likely to politicize the system, making the protocol less acceptable, and less easy to ratify. As for the choice between an individual and a collective procedure (para. 16), he considered that the matter should be governed by the legal principle of locus standi. In the case of economic, social and cultural rights, an individual affected by a situation was a party concerned. Several persons with similar interests could, of course, be affected simultaneously by the same situation (as in the case of minority groups, for example). One or more of such persons might thus lodge a complaint on their own behalf and on behalf of other persons with the same interests. Non-governmental organizations and other groups could not be permitted to lodge complaints on their own behalf as they could not themselves be the victim of a situation. However, they could take representative action on behalf of the victims of the violation notified to the Committee.

18. What proof was necessary to establish the legitimacy of a complaint? In his view, a single, isolated act was insufficient. That isolated act would have to be shown to be part of a pattern or one of a series of many acts of the same kind, or directed against a specific group as such. Like Mr. Simma, he felt that many of the criteria of admissibility adduced in the discussion note were not quite apposite. However, they might enable the Committee to reject a clearly frivolous complaint in the early stages of the procedure.

19. Mr. KONATE said it was perhaps too soon to contemplate the preparation of an optional protocol, at a time when the Committee still lacked sufficient experience. It was by no means certain that States shared its outlook on the Covenant and the extent to which the rights set forth in the International Covenant on Economic, Social and Cultural Rights could be translated into rules of positive law was unclear.

20. In his view, two criteria governing admissibility of complaints should be dismissed: the requirements that the complaint be significant or the action in question systematic. Who would be responsible for deciding what was significant or systematic? Would it be left to the discretion of the Committee? Would it also have to be recognized by the State party? The criteria were not merely vague, they were also dangerous, since they could lead to a miscarriage of justice. The criteria set out in existing instruments (as mentioned by Mrs. Ider) were perfectly adequate. Even so, the requirement for all domestic remedies to be exhausted could in some systems be too restrictive. In Senegal, for example, it could lead to very long delays.

21. A clear distinction had to be made between States and individuals in exercise of the right of complaint. In the case of civil and political rights, the provisions governing inter-State complaints appeared under article 41 of the Covenant, whereas those governing complaints by individuals appeared under article 1 of the Optional Protocol. The procedure differed somewhat depending on the case. If States' right of complaint was upheld, the Committee would have to consider whether such a distinction should be maintained.

22. It was difficult to say right away whether a complaint should be an individual or a collective procedure. As the Chairman had noted in his discussion note (para. 16), economic, social and cultural rights were of an essentially collective nature, whereas the Covenant explicitly referred to the rights of the individual, "everyone". Pleas would thus have to be accepted from both individuals and groups. Recognition of the representativity or otherwise of an organization, provided it was lawful, should not be left to the State. Any group or association should be able to represent the plaintiff.

23. He counselled members of the Committee against the approach in which States parties would be asked to indicate at the time of ratification the rights to which the procedure would apply in respect of themselves, since they might choose some rights and reject others that were nevertheless of fundamental importance. As for establishing a minimum number of rights, he pointed out that unlike the International Covenant on Civil and Political Rights which designated a number of articles from which no form of derogation could be made, the International Covenant on Economic, Social and Cultural Rights made no provision for any derogation and constituted in itself the minimum to be respected.

24. With regard to procedural rules, he wished to dispel some confusion between the criteria of jurisdiction and nationality, by pointing out that any person within the territory of a given State was subject to the laws of that State.

25. Although noting that States in general had reservations about optional protocols, he urged the Chairman to continue his work and hoped that States would appreciate the labours of the members of the Committee.

26. Mrs. BONOAN-DANDAN began by thanking the Chairman for his objective introduction of the various options that could be taken into consideration when drawing up an optional protocol. In an attempt to put herself in the

place of the victims of abuse of the rights set forth in the Covenant, she wondered, for example, what recourse a Philippine citizen would have whose child had been kidnapped and taken to Hong Kong, where it had suffered amputation and was forced to beg. That was abuse committed not at national but at regional level. Even if the mother appealed to the Government, the latter could do little unless it was prepared to break off diplomatic relations with the State concerned. Her only hope would lie with the Committee, unless the optional protocol could only be invoked by nationals of the State in question. For that reason, she considered that there had to be an inter-State complaints system to allow nationals of one State whose rights had been violated by another State to obtain redress. The time had come for the Committee to have an optional protocol available to it so that its work might take on a more human and less abstract character.

27. Mr. MRATCHKOV also thanked the Chairman for his very useful paper, which provided the Committee with a sound basis for discussion. Favouring the preparation of an optional protocol to the Covenant, he welcomed the progress the Committee had made in that direction over the past two years.

28. In his view, the Committee should consider an inter-State complaints procedure, despite the difficulties that might be entailed, in order to allow one or more States parties to lodge a complaint against another State party held not to have discharged the obligations incumbent on it under the Covenant. He further considered that complaints from groups of any kind should be allowed. If States parties were to be allowed to determine which groups should be authorized to lodge complaints, they might keep the number down, and, for example, restrict the right to token trade unions. Individuals should also be entitled to appeal to the Committee after all domestic remedies had been exhausted.

29. He considered that the procedure established by the optional protocol should apply to all the rights established in the Covenant, although conceding that some rights, such as those set out in article 11 of the Covenant, would cause difficulties. Similarly, he recognized that it would be very difficult, in the case of a complaint, to assess whether the provisions of article 2, under which States parties undertook to achieve progressively the full realization of the rights recognized in the Covenant, had been respected. It should be noted that an optional protocol would give the Committee, whether it wished it or not, a more jurisdictional role.

30. Referring to paragraph 47 of document E/C.12/1992/WP.9, on non-duplication of procedures, he wondered whether a complaint ought to be deemed inadmissible if another international body had already ruled on it. He recalled that a number of the rights set out in the Covenant, such as the right to freedom of association, were established in other international instruments, for example in ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, as well as in the International Covenant on Civil and Political Rights (art. 22).

31. In conclusion, he noted that in the French version of the document submitted by the Chairman (E/C.12/1992/WP.9), the acronym "ILO" had been translated by "BIT", whereas "OIT" would have been more correct.

32. Mrs. JIMENEZ BUTRAGEÑO said she also thought an inter-State complaints system should be considered. Furthermore, complaints should be allowed from any association, not merely non-governmental organizations with consultative status.

33. Referring to paragraph 36 of document E/C.12/1992/WP.9, she found the proposal for avoiding politicizing of the procedure interesting, noting that complaints relating to the right to self-determination could be laid before other international bodies. With regard to the criterion of admissibility ratione temporis proposed in paragraph 41 of the document, the procedure should not be limited to complaints relating to acts or omissions which occurred after the entry into force of the optional protocol for the State party concerned. In that respect, she noted that the Committee against Torture had, for example, recommended that in certain cases compensation should be paid to the victims of acts of torture committed before the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She therefore proposed that the optional protocol should contain a provision allowing the lodging of complaints about violations committed before its entry into effect.

34. In conclusion, she thanked the Chairman for his discussion note, encouraged him to continue his efforts and assured him of the support of the members of the Committee.

35. Mr. WIMER ZEMBRANO said that although he had followed the debate on the discussion note submitted by the Chairman with great interest, he did not consider the time to be ripe for the consideration of specific aspects of a draft protocol; there should instead be an open and general debate on the matter. He noted that all members of the Committee were in favour of the adoption of an optional protocol. The next stage should be to tackle more specific issues such as the technical and political problems that might arise and the pitfalls to be avoided.

36. Mr. KOUZNETSOV congratulated the Chairman on his discussion note, which had given rise to a very interesting debate. He proposed that the realistic approach proposed by Mr. Rattray should be followed. It was important that elaboration of an optional protocol could not be entrusted to a single member of the Committee; all should be involved. His own contribution would not be wanting.

37. Mr. FOFANA congratulated the Chairman on the logical way in which he had presented the various options. However, he felt there was also a need to consider the case of the developing countries. Underdevelopment was frequently put forward as an exceptional circumstance that dispensed the State parties concerned from fully implementing the provisions of the Covenant. He feared that States parties might invoke their underdevelopment as a reason for not adopting the optional protocol. States parties would therefore have to be shown that underdevelopment was not an obstacle to ratification of the protocol.

38. Mr. SIMMA said he wondered whether the procedure for friendly settlement of complaints covered in paragraph 50 of the discussion note (E/C.12/1992/WP.9), was compatible with the criterion requiring a "systematic"

act or omission. If a friendly settlement was achieved between a State and an individual, how would that affect other persons in a similar or somewhat comparable situation?

39. Furthermore, it must be borne in mind that matters relating to the abuse of economic, social and cultural rights were more difficult to deal with than in the case of civil and political rights, particularly in the light of article 2 of the International Covenant on Economic, Social and Political Rights, which left the concept of violation somewhat unclear.

40. Finally, he considered that the procedures covered in paragraphs 5 to 7 of the discussion note were very restricted in scope (in the case of the procedures used by the ILO, UNESCO and within the inter-American system), were confidential (UNESCO), or had never applied (resolution 1503). None of the instruments mentioned covered as broad a range of rights as the International Covenant on Economic, Social and Cultural Rights and their value as a precedent was thus limited. It was also important to ask whether the procedure envisaged should apply to all the economic, social and cultural rights mentioned in articles 6 to 15 of the Covenant.

41. In practical terms, there was a need to combine the discussion note submitted to the current session (E/C.12/1992/WP.9) with that submitted to the Committee at its sixth session (E/C.12/1991/WP.2). Such a document, which should also reflect the views expressed during the present discussion, ought to appear in the Committee's report and be communicated to the World Conference, together with a recommendation that the Conference should examine it carefully.

42. Mr. SPARSIS said that a protocol of the type under consideration should be applicable to all the articles of the Covenant. He recalled further that the procedure adopted by the ILO included strict penalties, up to expulsion of the State concerned. However, he doubted whether the Committee was in a position to envisage that approach and considered that it should rely on persuasion.

43. Mr. TEXIER said that he wished to make plain that he had no objection to an inter-State complaints system; he had merely noted that in practice such a procedure had rarely been invoked in the context of the international instruments that made provision for it. However, it might be of greater relevance in the context of the Covenant than in the case of other international instruments, since it would allow a State party to lodge a complaint against another State party, if it considered the latter to be in violation of its economic, social and cultural rights. That could be the case, for example, when pollution or a nuclear accident occurred or when a State party imposed an embargo on another for purely political reasons.

44. Mrs. PINET (World Health Organization) said that WHO received many complaints from individuals which it was unfortunately unable to follow up other than by publicizing them or attempting to persuade Member States to remedy the matters under dispute. WHO would therefore find it useful to be able to forward such complaints to the Committee should it be eligible to receive them.

45. As far as the right to health was concerned, two specific problems had to be borne in mind. On the one hand, it could be difficult to demonstrate that a violation was systematic. On the other, it was difficult for individuals to be familiar with all the domestic remedies available to them since public and private health care systems often existed side by side.

46. The CHAIRMAN recalled that the Committee's task was limited to discussion, and that the final decision regarding the adoption of a protocol and the form it should take was a matter for States parties.

47. Summing up the Committee's discussions, he noted that all members agreed that the procedure should be open to individuals and to groups, provided that the groups in question were representative of the victims.

48. With regard to inter-State complaints, the report would have to record the misgivings expressed by some experts that such a procedure might become politicized. Furthermore, the issue of the amount of publicity to be given to complaints remained unresolved.

49. With regard to the actual procedure, he considered Mr. Rattray's comment to be well advised and that, as in domestic procedures, the Committee should not only consider the admissibility of a complaint but also look into the basic issues involved.

50. There also appeared to be consensus among the members of the Committee that any optional protocol should cover all the rights recognized in the Covenant. However, in some cases - for example with regard to the right to food or the right to housing - the Committee would often be forced to acknowledge that article 2 of the Covenant made it difficult to admit some complaints. In any event, the procedure was relevant since it would allow the Committee to tackle actual cases, which was very difficult at present.

51. As for the temporal dimension of the procedure, he considered that the Committee should take its cue from the procedure adopted by the Human Rights Committee, under which a complaint relating to a long-standing violation was admissible if that violation continued after the entry into effect of the Optional Protocol.

52. In the case of an amicable settlement, he recalled that the European Convention on Human Rights contained a provision whereby any amicable settlement had to be compatible with respect for human rights. The Committee should make sure, even where both parties were satisfied with an amicable settlement, that human rights had been respected and that the measures intended to improve the enjoyment of economic, social and cultural rights were also applicable to persons in a similar or comparable situation to that of the person lodging the complaint.

53. Lastly, he proposed, as Mr. Simma had suggested, that a paper should be prepared that would combine the two discussion notes submitted to the sixth and seventh sessions (E/C.12/1992/WP.9 and E/C.12/1991/WP.2) and reflect the opinions expressed during the present debate. The resulting document could be

adopted at the same time as the Committee's report, of which it could form part, so that it might duly be considered by the Commission on Human Rights and the Economic and Social Council. The Committee might also forward the document to the World Conference on Human Rights, with a recommendation to examine the matter.

54. If there was no objection, he would take it that the Committee adopted that proposal.

55. It was so decided.

The meeting rose at 5.50 p.m.